

**- DECISION -**

Claimant:  
NEIL G FENNEKOHL

Decision No.: 89-BR-11

Date: January 19, 2011

Appeal No.: 1011219

S.S. No.:

Employer:  
GRANITE TITLE ASSOCIATES INC

L.O. No.: 60

Appellant: Employer

Issue: Whether is claimant is unemployed within the meaning of MD. Code Annotated, Labor and Employment Article, Title 8, Section 801.

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**- NOTICE OF RIGHT OF APPEAL TO COURT -**

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: February 18, 2011

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**REVIEW ON THE RECORD**

After a review on the record, the Board modifies the findings of fact by moving the last sentence of the last paragraph to the Evaluation of Evidence section. The Board adopts the hearing examiner's modified findings of fact. However, the Board concludes that these facts warrant a different conclusion.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28*

(1987).

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d); COMAR 09.32.06.04(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

*Md. Code Ann., Lab. & Empl. Art., § 8-801* provides:

(a) *Required for benefits.* – To be eligible for benefits, an individual who files a claim for benefits shall be unemployed.

(b) *Individuals considered to be unemployed.* – An individual is considered to be unemployed in any week during which the individual:

(1) does not perform work for which wages are payable; or

(2) performs less than full-time work for which wages are payable are less than the weekly benefit amount that would be assigned to the individual plus allowances for dependents.

*Md. Code Ann., Lab. & Empl. Art., § 8-101(x)* provides:

(2) “Wages” includes:

(ii) a commission;

The claimant was working full-time until he reduced his hours in January 2010. The claimant’s earnings are based solely upon commissions earned. The claimant could have continued to work full-time. In fact, the employer was of the opinion that the claimant was working full-time. The claimant continued to try to generate business and had, at the time of the hearing, commissions pending upon completion. During the hearing, the issue arose as to whether the claimant would be “unemployed” within the meaning of § 8-801 on a week where he did not receive a commission. To address this issue the Board finds as follows:

The purpose of the unemployment insurance law is not to supplement a commissioned salesperson’s income on weeks which they have not received a commission for services rendered. The fact that the claimant may not have received a commission during a particular week that he was engaged in pursuing sales on a full-time basis does not render him unemployed as a matter of law. The above-two provisions of the unemployment insurance law must be read in conjunction with one another. The claimant, during a week where he was engaged in the occupation as a full-time salesperson or marketer, but during a week where he did not receive commissions is not unemployed. During such a week, the claimant *did* perform services for which wages (i.e., commissions) are payable. Unlike regular weekly or bi-weekly wages, commissions are not necessarily paid on a regularly scheduled manner. Remuneration may be paid in

lump sums at irregular intervals. That does not mean during weeks that a claimant did not actually receive a commission that he was not performing services for which wages (commissions) were payable. In fact, a claimant in that situation would be performing services for which wages (commissions) would be payable. On the facts of this case, the claimant was not unemployed within the meaning of § 8-801.

The claimant raised the issue of commissions paid that resulted in significantly lower earnings than he had in the past year. That issue, while understandably important, is not before the Board and the Board shall not address this issue. The Board notes without deciding, however, that if one pursues commissions on a full-time basis but receives no commissions, even if the claimant would be considered unemployed, the issue of whether that claimant is able, available and actively seeking work may arise.

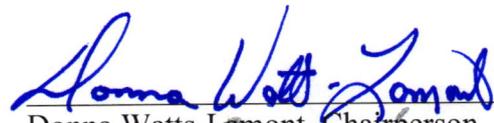
In a supplement to its letter of appeal, the employer contends that the claimant has chosen to limit his hours, and therefore his earning potential. That the claimant is not able to generate sufficient sales to earn what he has in the past does not make him unemployed under § 8-801. Whether the claimant could earn more if he devoted more time to the pursuit of sales is an unknown. However, the claimant has chosen to work in a business wherein earnings are solely based upon sales. The lack of commissioned sales does not make the claimant unemployed, and does not make him qualified or eligible for unemployment insurance benefits, based upon reduced earnings.

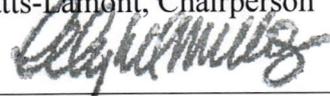
The Board finds based on a preponderance of the credible evidence that the claimant did not meet his burden of demonstrating that he was unemployed within the meaning of §8-801. The decision shall be reversed for the reasons set forth herein.

### DECISION

It is held that the claimant is not unemployed within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-801. Benefits are denied from the week beginning February 14, 2010 until the claimant is meeting the requirements of the law.

The Hearing Examiner's decision is reversed.

  
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Donna Watts-Lamont, Chairperson

  
\_\_\_\_\_  
Clayton A. Mitchell, Sr., Associate Member

RD/mw

Copies mailed to:

NEIL G. FENNEKOHL

GRANITE TITLE ASSOCIATES INC

SUSAN BASS DLLR

GAYLE TUREK

Susan Bass, Office of the Assistant Secretary

The claimant's evidence is that he was not made aware of the fact that the Board of Directors was not a body which would be required to be consulted in the event of the company's being wound up. It is not possible to say that the claimant was not made aware of the fact that the Board of Directors was not a body which would be required to be consulted in the event of the company's being wound up.

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DECISION

The Board has considered the evidence of the claimant and the respondents and has concluded that the claimant's claim is not well founded. The Board has concluded that the claimant was not made aware of the fact that the Board of Directors was not a body which would be required to be consulted in the event of the company's being wound up.

*James Watt*  
James Watt  
Director

The Board has considered the evidence of the claimant and the respondents and has concluded that the claimant's claim is not well founded.

James Watt  
Director

James Watt  
Director  
The Board has considered the evidence of the claimant and the respondents and has concluded that the claimant's claim is not well founded.

## UNEMPLOYMENT INSURANCE APPEALS DECISION

NEIL G FENNEKOHL

SSN #

**Claimant**

vs.

GRANITE TITLE ASSOCIATES INC

**Employer/Agency**

Before the:

**Maryland Department of Labor,  
Licensing and Regulation**

**Division of Appeals**

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1011219

Appellant: Claimant

Local Office : 60 / TOWSON CALL  
CENTER

April 22, 2010

**For the Claimant:** PRESENT , GAYLE TUREK

**For the Employer:** PRESENT , JOHN SHAPIRO

**For the Agency:**

### ISSUE(S)

Whether the claimant is unemployed within the meaning of MD. Code Annotated, Labor and Employment Article, Title 8, Section 801(b)(2).

### FINDINGS OF FACT

The claimant filed a claim for unemployment insurance benefits, establishing a benefit year effective February 14, 2010, and a weekly benefit amount of \$410.00. The Claims Specialist allowed benefits because, during the week the claimant filed for unemployment insurance benefits, he earned wages from this employer which were less than his weekly benefit amount, meeting the definition of "unemployed" found in Maryland Code, Labor & Employment Article, Title 8, Section 801(b)(2).

The claimant has worked for the employer since December 2008 on a commission only basis. The claimant was working fulltime until January 2010. Due to the economic downturn the claimant was not generating new income as his sales were lagging. In 2009, the claimant made \$33,000 in commissions. In 2010 his net pay has been \$984.15 thus far. The claimant is currently working 10 to 20 hours per week through his own choice. The claimant has only earned three pay checks this year and every other week he has earned nothing.

The claimant also previously had health insurance benefits. The claimant was expected to pay a portion of these benefits but in the past the employer would pay the claimant's share as long as regular sales were being made. In January the employer asked the claimant if he was still full time? The claimant responded affirmatively. The employer told the claimant that the claimant would have to pay for the claimant's portion of health benefits since the claimant was not generating the sales he previously had done. A week later the claimant informed the employer that the claimant no longer needed health benefits through the employer.

The employer never reduced the claimant's hours. The employer has a work space for marketers to work. Other marketers for the employer are bringing in the business. The employer thought the claimant was still working full time. Further the claimant has two deals pending with the employer where the claimant has pending commissions of \$652 and \$819.

While the employer has not reduced the claimant's hours, the claimant's income has been reduced due to his lack of sales below \$410 per week, which is the claimant's weekly benefit amount. In an effort to make ends meet, the claimant filed for unemployment insurance benefits the week beginning February 14, 2010.

### **CONCLUSIONS OF LAW**

Md. Code Ann., Labor & Emp. Article, Section 8-801(a) states that in order to be eligible for benefits, an individual who files a claim for benefits shall be unemployed.

Section 8-801(b) states that an individual is considered to be unemployed in any week during which the individual: (1) does not perform work for which wages are payable; or (2) performs less than full-time work for which wages payable are less than the claimant's weekly benefit amount plus allowances for dependents.

### **EVALUATION OF THE EVIDENCE**

The claimant had the burden to show, by a preponderance of the credible evidence, he/she was unemployed, during the period in question, as defined by Maryland Unemployment Insurance Law. In the case at bar, the claimant met this burden.

In Patterson, 777-BH-90, the Board of Appeals held "During the week ending December 10, 1988, the claimant was in claim status. She was employed by two different employers during this week, both on a part-time basis. ... The claimant's total earnings for the week ending December 10, 1988, were \$89.54. Her weekly benefit amount was \$181.00. The claimant earned less than her weekly benefit amount during the week ending December 10, 1988. Therefore, she was unemployed within the meaning of Section 8-801 and is entitled to payment of partial benefits."

Similarly, in the case at bar, the claimant was in claim status during the week beginning February 14, 2010, and "...earned less than (his) weekly benefit amount during (this) week...(t)herefore, he was unemployed within the meaning of Section 8-801 and is entitled to payment of (unemployment) benefits."

The information contained in the *Fact Finding Report* (AG EX #1) did not factor into the decision in the case at bar because, as the Board of Appeals held in Caccavo v. Hyatt Corporation, 902-BH-07, "None of the parties were under oath at the claims specialist level." Furthermore, the language contained in the *Fact Finding Report* is not the verbatim statements of the parties, but merely the Claim Specialist's interpretation of the parties' responses to the Claim Specialist's questions, memorialized in the notes of the Claim Specialist. At best the information contained in the Claim Specialist's notes is unverified hearsay evidence offered for the truth of the matters asserted therein. When juxtaposed against the sworn, in person testimony of the parties present at the hearing, the information contained in the *Fact Finding Report* lacks sufficient weight to overcome the in person testimony of the parties present at the hearing. For this reason, the undersigned Hearing Examiner gave no credence to the information contained in the *Fact Finding Report* and rendered the instant decision based solely on the testimony and evidence offered by the parties at the hearing on this matter.

Accordingly, I hold the claimant met his burden in this case and adequately proved he was unemployed, as defined by Maryland Unemployment Insurance Law, and benefits are, therefore, allowed.

### DECISION

IT IS HELD THAT the claimant is unemployed within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-801. Benefits are allowed from the week beginning February 14, 2010, provided that the claimant meets the other eligibility requirements of the Maryland Unemployment Insurance Law. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at [ui@dllr.state.md.us](mailto:ui@dllr.state.md.us) or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is reversed.

*E. P. Melcavage*

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E. P. Melcavage, Esq.  
Hearing Examiner

### Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

**A request for waiver of recovery of overpayment does not act as an appeal of this decision.**

**Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.**

**Notice of Right of Further Appeal**

Any party may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by May 07, 2010. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals  
1100 North Eutaw Street  
Room 515  
Baltimore, Maryland 21201  
Fax 410-767-2787  
Phone 410-767-2781

**NOTE:** Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : April 15,2010  
CH/Specialist ID: UTW81  
Seq No: 002  
Copies mailed on April 22, 2010 to:  
NEIL G. FENNEKOHL  
GRANITE TITLE ASSOCIATES INC  
LOCAL OFFICE #60  
SUSAN BASS DLLR  
GAYLE TUREK